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~~85-2056~~

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THEODORE YANOPOULOS,

Petitioner,

v.

DEPARTMENT OF THE NAVY and
MERIT SYSTEMS PROTECTION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

Petitioner was removed by the Department of the Navy, Naval Sea Systems Command, from his position of Electronics Engineer for unsatisfactory performance. He appealed this removal to the Merit Systems Protection Board. The Merit Systems Protection Board thereafter held an oral hearing at which petitioner appeared pro se and at which the Department of the Navy, Naval Sea Systems Command appeared with counsel. Petitioner was, among other things, precluded at the hearing from presenting the oral testimony of two individuals whom he wished to call as witnesses and the Department of the Navy, Naval Sea Systems Command was permitted to endeavor to prove its case through the use of extensive leading questions.

The questions presented are:

1. Whether the Merit System Protection Board's form orders dealing with the statutory right of Federal employees to representation before that agency sufficiently advise such employees of the nature of the hearing held by that agency or of the advantages of having counsel (or other representative) at such a hearing such that the employee can make a knowing and competent determination whether to obtain a representative or whether to waive his or her statutory right to representation.

2. Whether the United States Court of Appeals for the Federal Circuit erred in failing to reverse and remand the final Order of the Merit Systems Protection Board where petitioner had been deprived of the full and fair hearing to which he was

entitled before that agency.

Note: The case caption contains the names of all the parties to the proceeding in the United States Court of Appeals for the Federal Circuit.

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TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Petitioner Theodore Yanopoulos prays that a Writ of Certiorari issue to review the opinion and the judgment of the United States Court of Appeals for the Federal Circuit entered on January 28, 1986. A petition for

rehearing, which included a suggestion for rehearing in banc, was timely filed by petitioner to the United States Court of Appeals for the Federal Circuit. The Court of Appeals for the Federal Circuit, following consideration of the petition for rehearing on the merits, denied the petition for rehearing (and declined the suggestion for rehearing in banc) in an Order entered on March 19, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit as to which review is sought herein was entered on January 28, 1986. The Order of the Court of Appeals for the Federal Circuit denying petitioner's petition for rehearing (and declining petitioner's suggestion for rehearing in banc) was entered on

March 19, 1986. The opinion of the Court of Appeals for the Federal Circuit affirmed the opinion (contained in a document entitled Order) entered by the Merit Systems Protection Board on April 30, 1985, which in turn denied a petition for review filed with that agency by the petitioner and made the initial decision of MSPB Presiding Official William Jenkins (contained in his initial decision and in his subsequently issued supplemental initial decision) the final decision of the MSPB. All of the aforesaid Orders and Decisions are included in the Appendix hereto, in a separate volume.

JURISDICTION

The opinion of the Court of Appeals for the Federal Circuit was entered on January 28, 1986. A timely petition for rehearing was denied on March 19, 1986. This petition for

a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

PROVISIONS OF STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 7701(a):

Appellate Procedures

An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation. An appellant shall have the right -

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

5 CFR 1201.41:

Presiding Officials

(a) Exercise of Authority. Presiding officials shall conduct fair and impartial hearings and take all necessary action to avoid delay in the disposition of all proceedings. They shall have all powers necessary to that end unless otherwise limited by law, including but not limited to, the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas in accordance with Sec. 1201.81;

(3) Rule upon offers of proof and receive relevant evidence;

(4) Rule upon the institution of discovery procedures as appropriate under Sec. 1201.73;

(5) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum and exclude from the hearing any disruptive persons;

(6) Exclude from the hearing any witness whose later testimony might be colored by testimony of other witnesses or any persons whose presence might have a chilling effect on testifying witness;

(7) Rule on all motions, witness and exhibit lists and proposed findings;

(8)Require the filing of memoranda of law and the presentation of oral argument with respect to any question of law;

(9) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material and nonrepetitious;

(10) Impose sanctions as provided under Sec. 1201.43 of this part;

(11) Hold prehearing conferences for the settlement and simplification of issues; and

(12) File initial decisions.

STATEMENT OF THE CASE

Petitioner Theodore Yanopoulos (hereafter "Petitioner" or "Yanopoulos") was removed from his position of Electronics Engineer with the Department of the Navy, Naval Sea Systems Command (hereafter "NAVSEA") for alleged unsatisfactory performance effective October 1, 1982. He had held that position since July of 1951.

Using the appeal form supplied by the MSPB, which form is to be used for all appeals filed by Federal employees appealing adverse actions taken by their Federal employers against them, petitioner timely filed an appeal to the MSPB Washington Regional Office from the action of NAVSEA. Subsequently, on October 12, 1982 an Initial Order acknowledging the receipt of the appeal was entered by the MSPB Washington Regional Office's Acting Regional Director. Thereafter, on November 1, 1982, an Order for Hearing was entered by Stephanie Marks, the MSPB Presiding Official then assigned to hear the case, setting oral hearing in the case to be held on December 14, 1982. The Initial Order and the Order for Hearing, like the aforementioned appeal form, employed by the MSPB in Yanopoulos' case are form documents sent

out by the MSPB in all unsatisfactory performance cases which it handles; only names, places, and dates peculiar to the particular case are changed from case to case. For the convenience of the Court, the Initial Order and the Order for Hearing are included in the Appendix hereto.

The aforementioned three documents, the appeal form, the Initial Order, and the Order for Hearing, were the only documents which would in any way have advised Yanopoulos of the nature of the oral hearing scheduled in his case or his right to representation at the hearing prior to his appearance at that hearing.

As to the right to have counsel (or another representative) and the nature of the MSPB hearing, the Appeal form solely states the following in its questions 26, 27, and 28:

"26. You have a right to a hearing on this appeal. If you do not want a hearing, the Board will make its decision on the basis of the documents you and the agency submit. Do you want a hearing? . . .

27. You have the right to designate someone to represent you on this appeal if he/she agrees to do so. This person does not have to be an attorney. The agency has a right to challenge your choice of a representative if there is a conflict of interest or position. You may change your designation of a representative at a later date, if you desire, but must notify the Board promptly of any change.

28. You may be permitted to call witnesses at a hearing upon the approval of the Presiding Official. If you intend to do so, provide their names and a brief statement of their relationship to the case. You will be permitted to request other witnesses later if you do not list them now." (P.A. 03).[1]

[1] The abbreviation P.A. is used herein to refer to the Petitioner's Appendix contained in the back of the Opening Brief Petitioner filed with the Court of Appeals for the Federal Circuit below. The record shall be referred to herein by reference to pages of that Appendix.

The form Initial Order solely states as to the right to have counsel (or another representative) in its paragraph number 3 as follows:

> "Parties shall file with the Board a Designation of Representative form (enclosed) if they wish to be represented and have not previously designated a representative. Parties are required to notify the Board and each other of any change in representative during any stage of the proceedings. If there is a change in representative, the party shall strike the old representative from the service list and begin to make service on the new representative."

The sole statement contained in the Initial Order as to the nature of the MSPB hearing is in its paragraph number 6 as follows:

> "If a hearing is requested, it will be conducted approximately two to six weeks after the agency files its response to the petition for appeal as ordered in paragraph 2. At the time the hearing is scheduled the parties will receive information on how to arrange for presence of witnesses at the hearing. If a hearing has not already been requested the parties

> are provided 15 days from the date of this order to file a request. If no request for a hearing is received within the time limit, the hearing will be considered waived and the Presiding Official will adjudicate the case after providing the parties with the opportunity to file written submissions."

The third document, the form Order for Hearing, says nothing about the right to have counsel (or another representative) and provides no substantive information as to the nature of the hearing although it sets deadlines for filing lists of witnesses intended to be called, serving objections to witnesses of the other party, and for serving copies of hearing exhibits on the opposing party.

On November 30, 1982, 14 days before the scheduled hearing date, Yanopoulos sent a letter to the MSPB's Presiding Official then set to hear the case in which he indicated that he

would "secure a counsel to conduct discovery" and requested that the hearing date be changed to January 14, 1983 (P.A. 24). The Presiding Official then set to hear the case, Stephanie Marks, responded to this request and another request by NAVSEA for a continuance of the hearing date by entering an Order dated December 3, 1982 continuing the hearing date for a mere period of six days, until December 20, 1982. (P.A. 26). The hearing was held on December 20, 1982 with Yanopoulos appearing pro se.

As demonstrated by his sending of the aforementioned letter on November 30, 1982, Yanopoulos was equivocal and indecisive as to whether he wanted an attorney up to the date of the hearing held by the MSPB. He was also unaware of the nature of the MSPB hearing at the time his hearing began. In his

Affidavit dated September 4, 1985 which was filed with the Court of Appeals for the Federal Circuit pursuant to leave granted by that Court, Yanopoulos stated as pertinent to these matters:

> "5. I did not have any idea of how the hearing would be conducted or what procedures would be followed at the hearing until I appeared at the hearing. I never followed through in obtaining an attorney; I had the impression until the time the hearing actually began that I could properly represent myself at the hearing.
>
> 6. Once the hearing began, I realized that I needed an attorney very badly. I was, among other things, confused and had no understanding of the procedures to be followed or any idea how to conduct the hearing."

The oral hearing was held by the MSPB on December 20, 1982 before Presiding Official William Jenkins. The Presiding Official did not advise Yanopoulos of his right to counsel or even ask him whether he was waiving his statutory right to representation.

At the oral hearing, Yanopoulos, as the transcript of the hearing reflects, was thoroughly confused as to evidentiary matters, as to procedures, as to the involved law, and as to the nature of the hearing and how it was to be conducted. For example, he did not know how to make an opening statement (P.A. 33-35), interrupted the testimony of NAVSEA witnesses with testimony of his own (P.A. 38), and did not understand that it was necessary to ask questions rather than make statements on cross-examination (P.A. 40-43).

Pursuant to the MSPB's Order for Hearing dated November 1, 1982, both NAVSEA and Yanopoulos were to file with the Presiding Official prior to the hearing a list of the names of the witnesses they intended to call at the hearing. NAVSEA filed a Notice

of Witnesses listing eight witnesses it intended to call, all of whom were then NAVSEA employees (P.A. 22-23). Yanopoulos on December 7, 1982, sent a letter to the Presiding Official stating that "I wish to have available for me a presently unknown number of witnesses called by my Agency [NAVSEA]", thereby indicating that he wished to be able to call to the witness stand any or all of the witnesses designated by NAVSEA in its list of witnesses (P.A. 29).

NAVSEA, however, only produced at the hearing three of the eight employees it had designated as witnesses in its list of witnesses. The Presiding Official acknowledged that Yanopoulos desired to present the testimony of two of the other five employees who had not been produced, Simon Kfoury and Donald Cross, on matters which were

relevant. He refused, however, to require the appearance of Mr. Kfoury, who was then in California as he (the presiding official) had not been "previously requested to make him available today" and as requiring his appearance would delay the hearing. The presiding official further refused to require the appearance of Mr. Cross for oral testimony but instead requested NAVSEA's counsel to have Mr. Cross submit an affidavit addressing the questions raised by Yanopoulos. NAVSEA subsequently submitted a two page Affidavit executed by Donald Cross.

Numerous leading questions were asked by counsel for NAVSEA of its own witnesses in the presentation of its direct case, concerning such matters as whether Yanopoulos was made aware that his job performance was considered to be deficient, whether Yanopoulos

had been made aware of his performance standards prior to his having been advised that his performance was unacceptable under those standards, whether military guides and checklists were available to Yanopoulos as references in performing his duties, alleged specific instances of unacceptable performance on Yanopoulos' part, and matters relating to the advance written notice of unacceptable performance provided by Yanopoulos' supervisor to Yanopoulos. (P.A. 48, 53-55, 57-63). Yanopoulos did not object to such leading questions nor did the Presiding Official in any way attempt to stop or dissuade NAVSEA's counsel from asking such leading questions on direct examination.

Presiding Official Jenkins thereafter entered an Initial Decision on February 17, 1983 sustaining

NAVSEA's removal of petitioner from his position of Electronics Engineer.

Yanopoulos thereupon retained an attorney to represent him before the MSPB. Yanopoulos through counsel requested a new hearing by the MSPB in a Petition for Review filed with that agency on March 24, 1983 and in a letter-motion filed with that agency dated November 8, 1984 on the basis that he had not received a full and fair hearing and had been severely prejudiced by his lack of counsel and by the failure of the Presiding Official to see to it that a fair hearing was held in his case. The MSPB, although it on its own motion reopened the case as to a matter which was not placed in evidence at the hearing and which had only become pertinent as a result of a decision issued after the close of the hearing,

denied such requests for a new hearing and ultimately affirmed the Presiding Official and made his initial decision the final decision of the agency.

Yanopoulos thereupon filed an appeal from the Order of the MSPB to the Court of Appeals for the Federal Circuit pursuant to the provisions of 5 U.S.C. 7703.

The Court of Appeals for the Federal Circuit in a seven page per curiam decision affirmed the decision of the MSPB. The Court of Appeals found (1) that the MSPB adequately informed Yanopoulos of his right to representation, (2) that Yanopoulos knew of his right to representation in any event, (3) that the MSPB adequately informed Yanopoulos of the nature of the proceedings, (4) that the failure to obtain the oral testimony of certain witnesses Yanopoulos desired to

call to the witness stand "was petitioner's own fault", and (5) that petitioner failed to sufficiently show that he was prejudiced by the use of leading questions on direct examination by counsel for NAVSEA. Of particular importance, the Court found as follows:

> "More importantly, however, we find it incredible that this petitioner would not know of the nature of an MSPB hearing. He had been a Federal employee for 31 years and had obtained the level of a GS-12. The agency had recently removed him from the Federal service through a very lengthy and formal process that must have impressed upon petitioner the nature of this action. In light of his tenure as a Federal employee, the level of intelligence presumed from his rank, and the formality of the process used to remove him from the Federal service, petitioner must have known the nature of the MSPB's adjudication of his appeal."

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS SERIOUSLY ERRED CONCERNING NOTICE OF THE RIGHT TO REPRESENTATION BEFORE THE MSPB, AND THIS MATTER OF NOTICE AFFECTS NUMEROUS FEDERAL EMPLOYEES

The Court of Appeals for the Federal Circuit, in its opinion below, decided a precedent setting question of exceptional importance. That issue is whether the MSPB's form orders dealing with the statutory right of Federal employees to representation before that agency sufficiently advise such employees of the nature of the MSPB hearing or of the advantages of having counsel (or other representative) at such a hearing such that the employee can make a knowing and competent determination whether to obtain a representative or whether to waive his or her statutory right to

representation. The same form orders sent to Yanopoulos by the MSPB, and the same Appeal form, are used by the MSPB in all unsatisfactory performance cases.

As a result, the issue raised herein affects not just this case but many other cases as well. At the oral argument held by the Court of Appeals for the Federal Circuit below, Judge Friedman of that Court stated that he was loath to reverse the MSPB's decision concerning Yanopoulos on the basis of defective notice as to find the MSPB's form Orders defective in this regard would have the effect of invalidating numerous MSPB decisions and would affect the cases of a great number of Federal employees. And this is precisely why this Court should grant the sought writ herein. Considering that the Court of Appeals for the

Federal Circuit, pursuant to the terms of 5 U.S.C. 7703, is the only Court of Appeals to which an aggrieved federal employee can appeal a decision of the MSPB, it is particularly important that this matter of significance be considered by this Court herein. Otherwise, this significant matter will in all likelihood, due to the attitude of the Court of Appeals for the Federal Circuit articulated by Judge Friedman, never receive the level of appellate scrutiny which is warranted.

As previously shown, the right of a Federal employee to be represented in hearings before the MSPB is provided for in 5 U.S.C. 7701 (a)(2). That section states that an individual appealing from an adverse action taken by his employer agency against him "shall have the right to be represented

by an attorney or other representative."

The Courts have consistently held that a party having a statutory right to counsel at an administrative hearing must knowingly waive counsel or his lack of representation is itself cause for remand for a new hearing. Dobrowolsky v. Califano, 606 F. 2d 403, 407 (3rd Cir. 1979); Thomas v. Schweiker, 573 F. Supp. 327, 329-330 (W.D. Tex. 1985); Clark v. Harris, 652 F. 2d 399, 402-404 (5th Cir. 1981). See also Smith v. Secretary of Health, Education and Welfare, 587 F. 2d 857 (7th Cir. 1978), in which a social security disability case was reversed and remanded for a new hearing and in which the court pointedly observed at 859-860 that the appellant had been given only a minimal explanation of her right to

counsel and did not understand the role a lawyer would play in the proceeding.

It is fundamental that a party cannot knowingly waive his right to counsel or other representative unless he is made aware of the nature of the hearing he is going into. For example, in Partible v. Immigration & Naturalization Service, 600 F. 2d 1094 (5th Cir. 1979), the Fifth Circuit dealt with a case in which an individual had appeared pro se at a hearing of the Immigration and Naturalization Service in which she waived her statutory right to counsel provided for in 8 U.S.C. 1252(b)(2), and was thereafter found deportable. The Court found therein that the immigration judge had abused his discretion in denying her notion to reopen filed after his decision was issued and held that she

was entitled to a new hearing at which she could have the assistance of counsel. The Court stated as pertinent at 1096:

> "Although Partible was informed at the commencement of the hearing by the immigration judge of her statutory right to counsel and nevertheless elected to proceed unassisted, she waived her rights without being provided with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf and which her present counsel now presses in arguing for the reopening of her proceeding. Thus, in sum we conclude that Partible's waiver of counsel was not "competently and understandingly made", Matter Gutierrez Board of Immigration Appeals Interim Decision No. 2587, May 26, 1977; the outcome of the proceeding may have been different if counsel had been present; and that Partible is therefore entitled to a new hearing."

The MSPB has, however, through its form Appeal Form, form Initial Order, and form Order for Hearing failed to advise countless federal

employees (including Yanopoulos) of the nature of the MSPB hearing. Nor, significantly, has it advised such employees of the role counsel or another representative can play at such a hearing.

The oral hearing held by the MSPB is in fact a full scale administrative hearing at which knowledge of evidence, the ability to make evidentiary objections, and knowledge of the involved law are critical. Federal agencies appearing before the MSPB as employers are normally represented by counsel. Those few agencies which do not use counsel are represented by non-lawyers who, through practice, are very experienced in MSPB procedures and are knowledgable about the involved law. A federal employee who attempts to represent himself in an MSPB hearing has virtually no chance of success.

The MSPB misleads such individuals by not placing them on notice of the true nature of the MSPB hearing through the Appeal Form, the Initial Order, and the Order for Hearing.

As pertinent to the issues herein, the MSPB's Appeal Form does no more than advise the appealing federal employee that he can designate someone to represent him before that agency, that this representative need not be an attorney, that a hearing may be held in the case and that witnesses may be called. The Appeal Form, however, says nothing about the nature of an MSPB hearing.

The Initial Order utilized by the MSPB points out that a hearing may be held but also says nothing about the nature of an MSPB hearing. The Initial Order does provide some information concerning procedures not

relating to the hearing itself, primarily concerning discovery procedures. The Initial Order does not, contrary to the Circuit Court for the Federal Circuit's finding, "outline the Board's rules of procedure" but simply outlines certain limited rules unrelated to the nature of the hearing itself.

The Order for Hearing utilized by the MSPB sets the place and date of the hearing, provides information as to methods to obtain the presence of witnesses at the hearing, and sets dates for the filing of exhibits. It also says nothing about the nature of an MSPB hearing.

It would be a simple matter for the MSPB to advise federal employees appearing before it that the MSPB hearing is a formal adversary hearing at which witnesses will testify

pursuant to direct examination and cross examination; that evidentiary objections may be made and the Federal Rules of Evidence are in that respect used as a guide; and that it may as a result be to the advantage of that individual (although he may represent himself) to obtain a representative experienced in this type of proceeding. However, the MSPB does not advise federal employees of any of these critical matters, either in the Initial Order, the Order for Hearing, the Appeal Form, or in any other document. Without such information, the right to representation accorded by statute to federal employees appearing before the MSPB is meaningless and there can be no knowing waiver on the part of the involved federal employee of his or her right to representation. It should be kept in mind in this regard that

a great number of federal employees appear pro se at hearings before the MSPB; they are being misled just as Yanopoulos was.

If the Circuit Court of Appeals for the Federal Circuit's opinion is reviewed carefully, it soon becomes apparent that it really premises its decision as concerns the issue of notice of the nature of an MSPB hearing on its finding that it is "incredible that this petitioner would not know of the nature of an MSPB hearing", due to the length of his service as a federal employee, due to his GS-12 rating, and due to the "formality of the process used to remove him from the federal service." This unwarranted supposition, however, only serves to highlight the fact that the MSPB simply does not properly apprise federal employees of the nature of an MSPB hearing.

Petitioner, it may be noted, was

an Electronics Engineer with the Naval Sea Systems Command; not an employee of that agency's Employee Relations Division or of that agency's office of General Counsel where he would deal with MSPB procedures. It was not his job to appear at MSPB hearings or to deal with personnel matters for the agency. His job was to deal with matters of engineering. As indicated in his previously discussed Affidavit dated September 4, 1985, petitioner had no idea of how the MSPB hearing would be conducted or what procedures would be followed at the hearing until he appeared at the hearing. And there is no evidence of record to the contrary which would in any way support the Court of Appeals for the Federal Circuit's unwarranted supposition that petitioner must have known of the nature of an MSPB hearing.

The overwhelming majority of federal employees never set foot near an MSPB hearing. Being a longstanding federal employee or having a particular GS rating in no way makes one knowledgable of the nature of an MSPB hearing. Nor does the "formality of the process used to remove him from the federal service" in any way acquaint a discharged federal employee with the nature of an MSPB hearing. The process used to remove an employee from the federal service is strictly a paper process. The employee is permitted to submit affidavits to the deciding official in an effort to show why he should not be dismissed. No oral evidentiary hearing is held (in some cases, the employee may be permitted to make a type of oral argument to the deciding official). This not only does not acquaint the

employee with the nature of an MSPB hearing but, if it does anything, lulls him into believing that the MSPB hearing is similarly informal. It is thus essential that such employees be apprised of the nature of an MSPB hearing if their statutory right to a representative is to be meaningful.

Yanopoulos, like other employees before the MSPB, simply was not apprised by the MSPB, and was not on notice, of the nature of an MSPB hearing. And without being so apprised or on such notice he could not knowingly and competently waive his statutory right to representation. As such, he was and is clearly entitled to a new hearing before the MSPB at which he may have counsel present.

It should further be noted in this regard that not only did the MSPB fail to apprise Yanopoulos of the

nature of an MSPB hearing through its Appeal Form and form Orders but it in fact went so far as to frustrate Yanopoulos in any effort to obtain counsel by refusing to grant him more than a six day extension of the hearing date when he requested a one month extension of the hearing date two weeks before the then scheduled hearing date (P.A. 24-26). Thus, the instant case presents particularly compelling circumstances for reversal.

This matter of notice of the nature of an MSPB hearing is of such importance to so many affected federal employees and is of such a recurring nature as to be worthy of briefing and reasoned consideration by this Court. Federal employees are entitled to proper notice of the nature of an MSPB hearing so that they can make a knowing decision as to whether to

obtain representation or to waive their right to representation.

II. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERRED IN FAILING TO REVERSE AND REMAND THE MSPB'S FINAL ORDER IN VIEW OF PETITIONER HAVING BEEN DEPRIVED OF A FULL AND FAIR HEARING

Where a party before an administrative agency has not knowingly waived his right to representation, the reviewing Court clearly should reverse the agency's decision and remand the case for a new hearing if it finds that the party did not receive a full and fair hearing or was prejudiced by lack of counsel. Clark v. Harris, supra at 404; Floyd v. Schweiker, 550 F. Supp. 863,867 (N. D. Illinois 1982). Yanopoulos did not receive a full and fair hearing from the MSPB and was severely prejudiced at his hearing by the absence of counsel.

A federal employee appealing to the MSPB from an adverse action taken against him by his employer agency has a substantive right to a full, fair and impartial hearing before the MSPB. 5 U.S.C. 7701; 5 CFR 1201.41(a); Lockner v. Department of Transportation, 13 MSPB 45, 46 (1983). The MSPB's regulations at 5 CFR 1201.41(a) specifically require its presiding officials to "conduct fair and impartial hearings."

Yanopoulos, however, did not receive a full and fair hearing before the MSPB and was severely prejudiced by his lack of a representative insofar as counsel for the Naval Sea Systems Command was permitted, as previously shown herein, to ask extensive leading questions as to critical matters and insofar as Yanopoulos was precluded from obtaining the oral testimony of

two witnesses, Simon Kfoury and Donald Cross, whom he wished to call to the witness stand. If Yanopoulos had had counsel at the hearing, counsel would have objected to NAVSEA's leading questions and would have specifically designated witnesses (without doing so by reference to NAVSEA's list of witnesses as Yanopoulos did) in such a way that the oral testimony of Messrs. Kfoury and Cross would have been secured.

As the Court of Appeals for the Federal Circuit found below, the MPSB's Presiding Official has an obligation to assume a more active role in assisting a federal employee appearing pro se before the MSPB to the extent necessary to see to it that the pro se party receives the full and fair hearing to which he is entitled.

Petitioner, however, strongly

disagrees with the Court of Appeals' finding that this obligation was fulfilled in his case. The Presiding Official had an affirmative obligation to stop the leading questions and seriously erred when he failed to do so; it should have been completely obvious to the Presiding Official that Yanopoulos did not know that such questions on direct examination were objectionable and did not know how to object to such questions. The Presiding Official should also have permitted Yanopoulos to call Messrs. Kfoury and Cross to the witness stand, even if this required an additional day of hearing at a somewhat later date, particularly considering the intentions expressed in Yanopoulos' previously described December 7, 1982 letter to Presiding Official Marks concerning the witnesses Yanopoulos wished to have

available at the hearing (P.A. 29). By permitting counsel for NAVSEA to submit an affidavit from Mr. Cross, which of course was not subject to cross-examination and which of course was done in the manner which most favored NAVSEA's position, rather than requiring his oral testimony, the MSPB's Presiding Official grievously erred.

Under these circumstances, it is clear that the Court of Appeals for the Federal Circuit erred, by failing to find that the MSPB abused its discretion and acted arbitrarily by refusing to permit Yanopoulos to have the full and fair hearing to which he was entitled.

And the prejudice to Yanopoulos from not having counsel at the MSPB hearing only further highlights the importance of requiring the MSPB to properly apprise federal employees of

the nature of the MSPB hearing.

CONCLUSION

For the foregoing reasons, it is repectfully submitted that this petition for a writ of certiorari should be granted.

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Petitioner,

v.

DEPARTMENT OF THE NAVY and
MERIT SYSTEMS PROTECTION BOARD,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THEODORE YANOPOULOS,	)	
	)	
Petitioner,	)	Appeal
	)	No. 85-2592
v.	)	
	)	
DEPARTMENT OF THE NAVY	)	
	)	
	)	
Respondent.	)	

DECIDED: January 28, 1986

Before FRIEDMAN, Circuit Judge,
COWEN, Senior Circuit Judge,
and BENNETT, Circuit Judge.

PER CURIAM.

DECISION

The Merit Systems Protection Board (MSPB or Board) decision, 27 M.S.P.R. 647 (1985), sustaining the decision of the Department of the Navy (agency) to remove petitioner from his position because of unacceptable performance, is affirmed.

OPINION

Petitioner served as an electronic engineer until the agency removed him from the federal service because of unacceptable performance, effective October 1, 1982. On appeal before the MSPB, at which petitioner appeared pro se, the presiding official sustained the agency's decision and the full Board denied petitioner's request for review. Petitioner does not challenge on appeal to this court the sufficiency of the evidence to support his removal for unacceptable performance, but rather asserts a number of procedural errors in the conduct of his hearing before the MSPB.

A.

Petitioner asserts that the MSPB failed to adequately apprise him either of his statutory "right to counsel" granted under 5 U.S.C. § 7701(a)(2), or of the

nature of the MSPB's proceedings. Section 7701(a)(2) provides that an employee appealing to the MSPB shall have the right "to be represented by an attorney or other representative." The statute is not strictly a "right to counsel" as petitioner would seem to suggest, but is written broadly to confer a "right to representation" of the employee's choice, which may or may not be an attorney licensed to practice law.

We find that the MSPB adequately informed petitioner of his statutory right to representation. The MSPB Appeal Form (Optional Form 283), on which petitioner filed his appeal with the MSPB states very clearly, just above petitioner's signature that:

27. YOU HAVE THE RIGHT TO DESIGNATE SOMEONE TO REPRESENT YOU ON THIS APPEAL IF HE/SHE AGREES TO DO SO. THIS PERSON DOES NOT HAVE TO BE AN ATTORNEY * * *.

The MSPB acknowledged receipt of petitioner's appeal by mailing an Initial Order, dated October 12, 1982, which again stated that if petitioner wished to be represented, he should file a Designation of Representative form with the Board. Contrary to petitioner's assertion, these forms do not discourage federal employees appealing to the MSPB from seeking representation by attorneys. The wording of the form that the "person does not have to be an attorney," would clearly imply that the person may be an attorney, if the employee so desired.

Furthermore, the record in this case indicates that petitioner in fact actually knew of his right to be represented by an attorney, in any event. On November 30, 1982, petitioner sent a handwritten note

to the MSPB's presiding official stating that "I will secure a counsel to conduct discovery." This evidence vitiates his argument that the MSPB did not adequately inform him of that right.

We also find that the MSPB adequately informed petitioner of the nature of the proceedings. In the Initial Order, which the MSPB sent petitioner on October 12, 1982, the presiding official outlined the Board's rules of procedure. Three attachments were included with that order that fully discussed discovery procedures, such as production of documents. On November 1, 1982, the presiding official sent petitioner an Order for Hearing, which established the date and time for the hearing, discussed time limits for motions, and in an attachment, fully discussed the procedures for arranging the appearance of witnesses at the hearing.

Taken as a whole, these forms would certainly provide a federal employee appealing to the MSPB sufficient notice of the nature of the proceedings.

More importantly, however, we find it incredible that this petitioner would not know of the nature of an MSPB hearing. He had been a federal employee for 31 years and had attained the level of GS-12. The agency had recently removed him from the federal service through a very lengthy and formal process that must have impressed upon petitioner the nature of this action. In light of his tenure as a federal employee, his level of intelligence presumed from his rank, and the formality of the process used to remove him from the federal service, petitioner must have known the nature of the MSPB's adjudication of his appeal.

No statute or regulation requires the MSPB to appoint a representative for

employees appealing to the Board. Marsheck v. Department of Transportation, 15 M.S.P.R. 423 (1983). The MSPB having adequately informed petitioner of both his right to representation, and the nature of the proceedings, petitioner was obligated to secure his own representation, if he so desired. Thompson v. United States Coast Guard, 11 M.S.P.R. 461 (1982). Petitioner voluntarily chose to proceed pro se and must accept the consequences of that decision.

B.

Petitioner also contends that he did not receive a full and fair hearing before the MSPB's presiding official. First, petitioner argues that the presiding official denied petitioner's right to call four witnesses. Second, petitioner claims that the presiding official inappropriately allowed agency's counsel to prove

its case through extensive use of leading questions. We reject both these asserted grounds.

Petitioner argues that his letter of December 7, 1982, stating that: "I wish to have available for me a presently unknown number of witnesses called by my Agency," was adequate notice to the presiding official to require the appearance of four witnesses petitioner sought to testify. On November 1, 1982, however, the presiding official sent petitioner an Order for Hearing, which included an attachment outlining the procedures for arranging the appearance of witnesses. Petitioner did not attempt to arrange for the appearance of these four witnesses voluntarily, as is the first step in the procedures. Nor did petitioner seek to cooperate with the agency in arranging for these witnesses to appear at the hearing; this is the second step. Nor do we read petitioner's letter

of December 7 as a request to issue subpoenas to compel the appearance of these witnesses.

Having neglected to follow the MSPB's procedures for arranging the appearance of witnesses in the manner clearly outlined in the presiding official's Order for Hearing, petitioner was unable to show the presiding official good cause to require those witnesses to appear. The failure to arrange for those witnesses was petitioner's own fault. We find no error in the presiding official's denial of petitioner's request, made on the day of the hearing, that four witnesses be compelled to appear.

As for the use of leading questions by the agency's counsel, we find that the petitioner has failed to sufficiently persuade us that he was prejudiced by this practice. Although the Federal Rules of

Evidence do not apply to Board hearings, Debose v. United States Department of Agriculture, 700 F.2d 1262, 1268 (9th Cir. 1983), they are a helpful guide to what might be considered proper hearing practices. Even the Federal Rules of Evidence, which apply in stricter and more formal trial proceedings, allow for the use of leading questions to develop testimony. F.R. Evid. 611. We find no error in the presiding official allowing the agency's counsel to use leading questions in this case.

Finally, we find that the presiding official fulfilled his obligation to assume a more active role in helping the petitioner in this case, because petitioner appeared pro se. Sims v. Harris, 631 F.2d 26, 28 (4th Cir. 1980). Here the presiding official assisted petitioner in a number of ways, including helping petitioner in the questioning of witnesses,

and in making opening and closing statements.

Conclusion

For the reasons stated above, the decision of the MSPB is affirmed.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

THEODORE YANOPOULOS	)	DOCKET NUMBER
	)	DC04328310008
v.	)	
	)	
DEPARTMENT OF THE NAVY	)	Date: April 30, 1985

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on February 17, 1983, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the

petition.*/

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination. The

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*/ Appellant's claim that the hearing was unfair is without merit. Appellant had a right to secure an attorney or other representative to represent him and he must abide by the consequences of his decision. Thompson v. United States Coast Guard, 10 MSPB 397 (1982).

In reaching this conclusion, the Board concurs with the presiding official that the agency afforded appellant a reasonable opportunity to improve his performance. See Sandland v. General Services Administration, 23 M.S.P.R. 583 (1984).

statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action

in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judi-

cial review, if the court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION
WASHINGTON REGIONAL OFFICE

THEODORE YANOPOULOS	)	CASE NO.
	)	DC04328310008
v.	)	
	)	Date: Feb. 17,
DEPARTMENT OF THE NAVY	)	1983

INTRODUCTION

By petition filed October 14, 1982, Theodore Yanopoulos (appellant) appealed to the Board's Washington Regional Office from the action of the Department of the Navy, Naval Sea Systems Command (hereafter the agency) removing him from his position of Electronics Engineer for unacceptable performance. The removal was effective October 1, 1982. This decision is based on the written submissions of the parties as well as the testimony and documentary evidence presented at a hearing held on December 20, 1982.

JURISDICTION

Under 5 U.S.C. § 7701(a), the Merit Systems Protection Board has jurisdiction over any action made appealable to it by law, rule, or regulation. As an employee in the competitive service who has been removed for unacceptable performance under the provisions of 5 U.S.C. § 4303, appellant is entitled to appeal to the Board. 5 U.S.C. § 4303(e), 5 C.F.R. § 432.206.

FINDINGS AND CONCLUSIONS

The agency's removal of appellant for unacceptable performance was taken under 5 U.S.C. § 4303 and 5 C.F.R. Part 432. "Unacceptable performance" is defined as "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." 5 U.S.C. § 4301(3). "Critical element" is defined at 5 C.F.R. § 430.202(e) as:

> ...a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

The July 26, 1982, notice of proposed removal charges appellant with unacceptable performance in critical elements 1 and 2 established for his position of Electronic Engineer, GS-855-12. Critical element 1 specifies that appellant is to "Develop general design and testing requirements to be included in SEA 61 acquisition program documents." Critical element 2 states that appellant is to "Monitor contractor's implementation of the general design and testing requirements." The job requirements identified in these critical elements are also listed as duties 1 and 2 in appellant's position

description (Agency Exhibit 1). The position description and the undisputed testimony of Mr. Toshio Oishi, appellant's immediate supervisor, show that critical elements 1 and 2 describe duties that are major components of appellant's job.

To sustain its removal of appellant, the agency must establish by substantial evidence 1/ that appellant failed to meet the established performance standards for critical elements 1 and 2. 5 U.S.C. §§ 7701(c)(1)(A); 5 U.S.C. 4301(3). The standards for appellant's position includes a description of "Highly Satisfactory" and "Marginal" performance. (Agency File - Tab 11). Performance which

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1/ Substantial evidence is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true." 5 C.F.R. § 1201.56(c)(1).

fails to meet the marginal standard is unacceptable. Appellant's work performance is alleged to have been below the marginal level for both critical elements.

For critical element 1, performance is at a marginal level if "[r]equirements developed are generally technically complete, comprehensive and timely but frequently requires rewrite for clarity." The specific instances in which appellant's performance is alleged to have fallen below this level are listed in enclosure 1 to the July 10, 1982 notice of proposed removal. (Agency File - Tab 8). The detailed testimony of Mr. Oishi and the documentation on each assignment (Agency File - Tab 7) show that appellant, as charged, failed to prepare the required comments or checklists for any of the 12 listed assignments. Although appellant is critical of the supervision and assistance provided by

Mr. Oishi and of his opportunity to improve his performance, issues which will be discussed subsequently, he presented no evidence or testimony contradicting the agency's documentation of his non-performance of work required by critical element 1. The agency, therefore, has presented substantial evidence that appellant failed to meet the marginal standard for his position and that his performance for critical element 1 was unacceptable.

The marginal performance level for critical element 2 is defined as follows:

> Requires frequent direction to monitor implementation of the general design and testing requirements. However, when so directed generally performs complete and timely reviews of general design and testing data, reports, and program status. Reports problems at times without determining and recommending appropriate corrective action.

As was the case with appellant's work performance under critical element 1, the testimony of Mr. Oishi and the related

documentation (Agency File - Tab 7) concerning the assignments identified in enclosure 2 to the notice of proposed removal show that appellant in most instances failed to provide the required reviews and reports. On those occasions that the necessary response was submitted by appellant, it was not, Mr. Oishi testified, of acceptable quality. Appellant testified generally that Mr. Oishi did accept some of his work, but he presented no evidence nor did he even claim that his work on the specific assignments enumerated by the agency was in fact completed or that it should have been accepted. Appellant's demonstrated performance of work required by critical element 2 is shown to have been both incomplete and untimely and therefore below the marginal level. The agency, consequently, has proved by substantial evidence that appel-

lant's performance for critical element 2 was unacceptable. 2/

Under 5 U.S.C. § 4302(b)(6) and Office of Personnel Management regulations at 5 C.F.R. §§ 432.101(a) and 432.203(b), an employee may be removed for unacceptable performance only after having been provided a reasonable opportunity and time to demonstrate acceptable performance. On February 18, 1982, appellant was issued an advance notice of unacceptable performance. (Agency File - Tab 13).

2/ Under 5 U.S.C. § 4303(c)(2)(A) the instances of unacceptable performance which serve as the basis for the removal action must have occurred during the 1-year period ending on the date of the July 26, 1982, proposal notice. Several of the assignments listed in enclosure 2 of that notice were given to appellant prior to this 1-year period. These assignments were of a continuing nature, however, and were still incompleted or of unacceptable quality on July 26, 1982. These instances of unsatisfactory performance were thus properly considered by the agency.

That notice cited specific examples of unacceptable performance in critical elements 1 and 2, identified the actions required to bring appellant's performance to an acceptable level, and explained that Mr. Oishi would meet regularly with appellant and review his work. Mr. Oishi testified that between February and July 1982 he met often with appellant to review his progress and that in May 1982 a formal progress review was conducted. (Agency File - Tab 11). Mr. James W. Brush, Head, Technical Support/Material Management Division and appellant's second level supervisor, attested to Mr. Oishi's meetings with appellant, and testified that he too met with appellant to impress upon him the seriousness of his performance deficiencies and to make recommendation for improving his work. Appellant, on the other hand, maintains that he was never given guidance and direction. On

cross-examination, however, he explained that Mr. Oishi did go over his projects and did indicate corrections that should be made. Moreover, in characterizing the remarks made by Mr. Oishi during these sessions as criticism rather than guidance, appellant further acknowledges Mr. Oishi's review of his work. Substantial evidence that appellant was provided reasonable time and opportunity to demonstrate acceptable performance is therefore present in the record.

Appellant further alleges that Mr. Oishi was biased against him, that Mr. Oishi shunned and ostracized him with the ulterior motive of firing him, and that Mr. Oishi failed to break him in and "piled up" work. It is "one thing to make a bare allegation of bias and something else entirely to produce evidence in support thereof." Schaefer v. United

States, 633 F.2d 945, 949 (Ct. Cl. 1980). Here the appellant has presented no such evidence. The testimony of Mr. Brush and Mary Jane Hardy, a secretary in appellant's office, indicates that Mr. Oishi was a good supervisor who treated all employees fairly. Neither Mr. Brush or Ms. Hardy was aware of any behavior on the part of Mr. Oishi that demonstrated a bias against appellant. Appellant's claim is in part based on his testimony that while traveling with Mr. Oishi he had inadvertently made a remark that may have offended him. Mr. Oishi, however, denied any knowledge of such an occurrence and in fact explained that he had never traveled with appellant. The written statement of a co-worker of appellant's also suggests that it was appellant who avoided Mr. Oishi. Mr. Donald E. Cross, Electronic Technician, explained that while he and

other employees would meet with Mr. Oishi prior to and during a project to discuss the procedures to be used, appellant would complete a job on his own and then submit it to Mr. Oishi. In Mr. Cross' view, appellant's "methods limited the time he spent with Mr. Oishi."

Appellant's claims that Mr. Oishi was obligated to "break him in" is likewise unsupported by any evidence in the record. Appellant, who had been an Electronics Engineer with the agency since 1967, came under Mr. Oishi's supervision in April of 1981. The testimony of Mr. Oishi and of appellant, upon cross examination, shows that there was no change in appellant's duties or position description on that occasion or at any time during the period he worked for Mr. Oishi. Appellant is shown to have been fully aware of the requirements of his position. (Agency

Exhibits 1 and 2). The evidence in the record also disproves the contention of appellant that Mr. Oishi "piled up" his work. Mr. Oishi testified that because appellant did not take the initiative on projects assigned to him, he did have to give appellant more specific tasks. Appellant's overall workload, however, was the same as that of other employees in the office. Appellant's work piled up only because appellant failed to complete his assignments. In this regard, I must also note the testimony of Mr. Hardy and Mr. Oishi that they frequently observed appellant reading a newspaper and working on a correspondence course during duty hours. Although he disagreed with the witnesses' testimony as to the frequency of these activities, appellant did acknowledge their occurrence. Such conduct reflects adversely upon the credibility of appellant and the bona fides of his claim

that Mr. Oishi and not he was responsible for his uncompleted work and his unsatisfactory performance. Appellant's allegation of bias on the part of Mr. Oishi is, I find, unsupported by any evidence in the record.

Appellant also alleges that his removal was the result of discrimination based on his age. Discrimination because of age is prohibited in Federal employment by sections 12 and 15 of the Age Discrimination in Employment Act (ADEA) of 1967 (29 U.S.C. §§ 631, 633a) and constitutes a prohibited personnel practice under 5 U.S.C. § 2302(b)(1)(B). Appellant has the burden of establishing that his removal was the result of age discrimination. 5 U.S.C. § 7701(c)(2)(B); 5 C.F.R. § 1201.56(b)(2).

Appellant, age 61 at the time of his removal, is within the age group protected by the ADEA. He has not, however, presented any evidence that his age was a factor in the agency's removal action. His claim, he testified, is based solely on comments concerning his eligibility for retirement that were made during his personal reply to RADM D. M. Jackson, Deputy Commander, Combat Systems Directorate. RADM Jackson made the final agency decision on appellant's removal. (Agency File - Tab 3). The written summary of appellant's personal reply does show that RADM Jackson, at the conclusion of the meeting, did state to appellant, "I see that you are eligible to retire if you wanted to." In the context of the comments being exchanged between appellant and RADM Jackson, that statement is not shown to be anything other than an informal inquiry. Even if viewed as an indirect suggestion

to appellant that he consider retirement, RADM Jackson's remark would not be inappropriate. The reference to appellant's retirement eligibility is in any event insufficient to establish a connection between appellant's age and the agency's decision to remove him for unsatisfactory performance. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). Moreover, even if appellant has established a prima facie case of age discrimination, he did not overcome the agency's articulated, nondiscriminatory reason for its action. Stewart v. U.S. Postal Service, MSPB Order No. DA07528010154 (November 28, 1981); Siegelman v. Department of Housing and Urban Development, MSPB Order No. DC0432810293 (January 10, 1983). I find, consequently, that appellant has not met his burden of showing that age discrimination was the basis for his removal.

Finally, through the testimony of Mr. Oishi and Mr. Brush, the agency his explained its reasons for removing appellant rather than demoting or reassigning him. The position held by appellant, Electronics Engineer, GS-855-12, was an important one and his unacceptable performance seriously affected the ability of his office to provide adequate support to the agency's project engineers. In this regard Mr. Oishi stated that he had received complaints about appellant's work from those engineers. He and Mr. Brush also explained that because of the work habits demonstrated by appellant and his non-performance of numerous projects, he could not be reassigned or even demoted to some other position that also required engineering expertise. They also testified that because appellant had been given

assistance and a lengthy period of time in which to improve and had already been given training, removal was the only solution to the problem created by his unacceptable performance. The agency, I find, has therefore established by substantial evidence its decision to remove appellant for unacceptable performance under the procedures of 5 U.S.C. § 4303. 5 U.S.C. § 7701(c)(1)(A).

DECISION

The removal action is SUSTAINED.

NOTICE

This decision is an initial decision. It will become a final decision of the Merit Systems Protection Board on March 24, 1983 unless a petition for review is filed with the Board within thirty-five (35) calendar days after the date of this decision.

Any party to this appeal, the Director of

the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. 5 U.S.C. § 7701(e)(2). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule or regulations.

The petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, 1120 Vermont Ave., N.W., Washington, D.C. 20419, no later than thirty-five (35) calendar days after the date of this decision. If a petition for

review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

> (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

The appellant has the right to petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's final decision on the issue of discrimination, either when this initial decision becomes final on the date set forth above or after final Board action when appellant has petitioned the Board for review or the Board has reopened the case on its own motion. The appellant [may file a civil action in]

court without either petitioning the EEOC or the Board or after either body has rendered a final administrative decision. Either a petition or a civil action may be filed, but not both, no later than 30 days after the Board's decision has become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived.

Except for actions filed under the anti-discrimination laws, a petition for judicial review of a final Board decision must be filed in the U.S. Court of Appeals for the Federal Circuit no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

William C. Jenkins
Presiding Official

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

THEODORE YANOPOULOS	)	CASE NO: DC04328310008REM
v.	)	
DEPARTMENT OF THE NAVY	)	DATE: Feb. 1, 1985

SUPPLEMENTAL INITIAL DECISION

By order dated November 2, 1984, the Board remanded this case for a determination whether the agency has established Office of Personnel Management (OPM) approval of the performance appraisal system under which it took the action against appellant. As neither party demonstrated or alleged that this issue was previously raised before the close of the record, a second opportunity to address it was provided.

Correspondence from OPM submitted by the agency shows that OPM approved the

agency's performance appraisal plan in October 1980. That plan was subsequently implemented by the agency in October 1981, and was therefore in effect when the instant action against appellant was initiated in 1982. Appellant has not offered any rebuttal evidence and in a January 29, 1985, submission has stated that he is satisfied that an OPM approved plan was in place. The agency, I conclude, has therefore established by substantial evidence that OPM had approved its appraisal plan before action under 5 U.S.C. Chapter 43 was taken against appellant. Hazzard v. Department of the Navy, MSPB Docket No. DC04328310295 (December 4, 1984); Griffin v. Department of the Army, MSPB Docket No. CH07528210163 (October 22, 1984).

NOTICE

This is a supplemental initial decision.

This decision and the appellate record are hereby forwarded to the Clerk of the Board to be reunited with the pending petition for review. The parties may file exceptions to the supplemental initial decision with the Office of the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, for consideration by the Board in connection with the pending petitions for review in this appeal. Such a submission must be filed within thirty (30) days of the issuance date of the supplemental initial decision, and each party making such a submission must include a statement certifying service of a copy of the submission on the other party. Upon receipt of the supplemental appellate record from the Regional Office and any exceptions to the supplemental initial decision timely filed by the parties, the

Board will issue a final decision in this appeal.

For the Board:

_____

William C. Jenkins
Presiding Official

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THEODORE YANOPOULOS,	)	No. 85-2592
	)	
Petitioner,	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY,	)	
	)	
Respondent.	)	

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD, DC04328310008. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

DATED: January 28, 1986

ENTERED BY ORDER OF THE COURT

Francis X. Gindhard, CLERK

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THEODORE YANOPOULOS,	)	Appeal
	)	No. 85-2592
Petitioner,	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY,	)	
	)	
Respondent.	)	

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

3-19-86 _____
Date Francis X. Gindhart, Clerk

Date: March 19, 1986

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

THEODORE YANOPOULOS,	)	
	)	Date: Oct. 12,
Appellant,	)	1982
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND	)	
	)	
Agency.	)	

INITIAL ORDER

The above captioned case has been filed with this office and has been assigned to a presiding official, Stephanie Marks. All material submitted to the Board in this appeal must be addressed to this presiding official.

In accordance with the Board's rules of procedure, it is hereby ordered:

1. Filing and Service. All further submissions to the Board, including

motions, responses to an opposing party's submission, requests for discovery, designations of representative, and all other documents, must be filed with an original and one copy on 8 1/2 x 11 inch paper. */ A copy of any submission to the Board must be served simultaneously on the opposing party(ies) noted on the attached service list. Service may be made by mailing or personally delivering the submission to the opposing party(ies). All submissions to the Board must include a certificate of service specifying the name and address of the party served, the date of service, the method of service (mail or personal delivery), and the signature of the person certifying that service was made. An example of a

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*/ Office hours are from 8:15 a.m. to 4:45 p.m.

certificate of service is included with this order. No submission will be considered properly filed if it is not accompanied by a certificate of service. 5 C.F.R. 1201.26 as amended, 46 Fed. Reg. 62045 (1981).

2. Agency Response. The agency must file in accordance with paragraph 1 the material listed in ATTACHMENT A and any additional material required by 5 C.F.R. 1201.25 within 20 calendar days of the date of this order. The material must be organized in the manner described in ATTACHMENT B.

3. Representative. Parties shall file with the Board a Designation of Representative form (enclosed) if they wish to be represented and have not previously designated a representative. Parties are required to notify the Board and each other of any change in representative during any stage of the proceedings. If

there is a change in representative, the parties shall strike the old representative from the service list and begin to make service on the new representative.

4. Responses. Unless otherwise ordered by the presiding official, any party who wishes to respond to a submission filed with the Board by an opposing party must file the response no later than 10 days after receiving the submission from the opposing party.

5. Discovery. The Board encourages the parties to cooperate with each other and to conduct voluntary discovery, if discovery is needed. An explanation of discovery and procedures for its use are contained in ATTACHMENT C. The Board's regulations concerning discovery are contained at 5 C.F.R. 1201.71-1201.75. Unless otherwise ordered by the presiding official, discovery must be fully com-

pleted no later than 50 days from the date of this order.

6. Hearing. If a hearing is requested, it will be conducted approximately two to six weeks after the agency files its response to the petition for appeal as ordered in paragraph 2. At the time the hearing is scheduled the parties will receive information on how to arrange for the presence of witnesses at the hearing. If a hearing has not already been requested the parties are provided 15 days from the date of this order to file a request. If no request for a hearing is received within the time limit, the hearing will be considered waived and the presiding official will adjudicate the case after providing the parties with the opportunity to file written submissions.

7. Ex Parte Communications. Ex parte communications are oral or written communications between decision-making person-

nel of the Board and an interested party to an appeal without providing the other parties a chance to participate. Those ex parte communications which involve the merits of a case or violate other rules requiring submissions to be in writing are prohibited. Sanctions may be imposed on any party engaging in prohibited ex parte communications. See 5 C.F.R. 1201.103.

8. Adjudication. It is the policy of the Merit Systems Protection Board to issue an initial decision on an appeal within 120 calendar days after the petition for appeal is filed. The Board expects the parties to cooperate in the expeditious processing of this case. Failure to prosecute or defend the appeal may result in judgment for the opposing party.

9. Sanctions. Since the purpose of this order is to assist in the prompt prepara-

tion and adjudication of the case, all parties shall comply with each section of this order and in particular with the time limits set herein. If either party fails to comply with this order, sanctions may be imposed. Sanctions include, but are not limited to, striking untimely submissions from the record.

The Board's appellate regulations are found in Title 5, Code of Federal Regulations, Part 1201. These are available for review in the offices of the Board, agency personnel or employee relations offices, and in some large public libraries. The regulations should be consulted for detailed information on the practices and procedures followed by

the Board in processing an appeal.

MARTHA J. LANPHEAR
Acting Regional Director

Attachments for Appellant
  Designation of Representative
  Attachments A, B, and C
  Privacy Act Notice
  Service List
Attachments for Agency
  Designation of Representative
  Attachments A, B, and C
  Petition for Appeal
  Service List

ATTACHMENT A

SCHEDULE 7: PRODUCTION OF DOCUMENTS IN AN APPEAL FROM AN ACTION BASED ON UNACCEPTABLE PERFORMANCE

General Information

All evidence concerning an appeal must be disclosed to the parties. Therefore, no classified document can be received in evidence unless accompanied by a statement that it is declassified and that full disclosure is permitted.

Statements of witnesses should be in affidavit form, and must be released without a pledge of confidence. Documents must be certified and true and correct copies.

Materials Required to be Filed

1. Any grievance or allegation of discrimination raised with the agency by the appellant or in the appellant's behalf concerning the action under

appeal;

2. The decision, if any, issued by the agency in such a grievance or allegation of discrimination;

3. Evidence of the date and nature of the appellant's last appointment (if not shown on the SF-50);

   (a) If the appellant is in the competitive service, evidence of the date on which the appellant completed a probationary or trial period;

   (b) If the appellant is in the excepted service, evidence which established the appellant's entitlement to veterans preference and evidence that the appellant has or has not completed one year of current continuous service immediately prior to the effective date of

the removal or reduction in grade;

(c) If the appellant is a supervisor or manager, evidence that the appellant has or has not completed a probationary period under 5 U.S.C. 3321(a)(2);

4. The notice of proposed action;

5. The appellant's written reply, if any;

6. Summary of the appellant's personal reply, if any;

7. The notice of the decision;

8. The SF-50 or other notification of personnel action documenting the action under appeal;

9. Evidence of the dates the appellant received the notices of proposed action and decision;

10. Evidence of the performance standards, if any, applicable to the

appellant's position;

11. Evidence supporting the action taken including the affidavits of any witnesses;

12. Response to material issues raised by the appellant.

ATTACHMENT B

Those documents that are part of your agency's record of the proceeding on this case should be organized for each set in the following manner.

1. The documents are placed in the file in order of date with the oldest document at the top and the most recent document at the bottom.

2. A table of contents is prepared that identifies the case and lists all the enclosed documents (the oldest document is identified and tabbed as number 1, the next document in date sequence is identified and tabbed as number 2, and so on with the highest number indicating the most recent document).

3. The table of contents should have the following headings:

Location	Date	Document Source Description

(The location indicates the tab number under which the document is filed; the date is the date of receipt or issuance of the document; document description fully identifies the document; source indicates who submitted the document).

4. The completed table of contents is placed on top of the tabbed documents.

Your comments on the appellant's petition and any submission in rebuttal to the appeal shall be furnished with but not placed in the file that has been tabbed and indexed.

ATTACHMENT C

DISCOVERY PROCEDURES

Both the appellant and the agency should start preparing the case immediately. Such preparation should include gathering documentary evidence, identifying any witnesses, and deciding which arguments you will present to support your side of the case. The Board intends that all proceedings on appeals be conducted as expeditiously as possible with due regard to the rights of the parties. Parties who prepare before the hearing and know what they want to accomplish at a hearing or in their written presentations assist the presiding official in deciding an appeal on a complete record in a timely manner. Each party probably already possesses some evidence pertinent to the case. A copy of any evidence the appellant may have attached to the appeal is being served on the agency with the order acknowledging

receipt of the appeal. A copy of any response the agency submits to the appeal will be served on the appellant or the designated representative.

If you are aware of other relevant evidence under the control of the opposing party, which is not included in the appeal or the agency response, you may obtain this evidence by using the discovery procedures. Discovery is the means by which parties may learn of the facts, documents or other evidence necessary to their case which is in the exclusive knowledge or control of the opposing party and which has not already been provided (such as the documents submitted with the agency response to the appeal). The party seeking discovery bears the costs involved. The following procedures are commonly used to secure documents or other information under the control of the

opposing party. These procedures do not cover all of the provisions of the Board's regulations; therefore, you are urged to review the regulations for detailed and complete information. See "Evidence," "Discovery" and "Subpenas" in 5 C.F.R. 1201.61-1201.85.

1. Production of documents.

A party presents a written request to the designated representative of the other party asking it to produce specifically identified documents or information. Two copies of the request must be sent to the presiding official. A statement of the general relevance of the information sought to the case should be included. This often minimizes objections. It also alerts the presiding official to why the information may be necessary to the party seeking it when the presiding official rules on any objections.

Within five working days after receipt of the request, the other party complies with the request, resolves any difficulties, or, if cooperation fails, files two copies of a written objection to the request with the presiding official, sending a copy to the party who requested the discovery. The presiding official rules on the objection and, if appropriate, orders the party to produce the information.

If a party requesting the information does not receive it or an objection from the other party within a reasonable period of time, the requesting party should ask the presiding official to order the other party to produce the information. If the presiding official is not informed of any objections or does not receive a request for an order to produce by the deadline date for discovery to end, the presiding official will assume that the parties have

resolved any questions on the production of information.

2. Depositions and interrogatories. A party who wishes to take depositions or have responses given to interrogatories should follow the same procedure described above for the production of documents with one exception. In the face of an objection the party seeking discovery, within five days of the receipt of the objection, must file a motion with the presiding official stating the basis for the request and the order desired. Only Board members and administrative law judges of the Board have the authority to order the taking of depositions and responses to written interrogatories. The presiding official will refer the motion to a Board member or an administrative law judge who will act on the motion directly or authorize the presiding official to do so.

In ordering discovery, the Board will carefully balance the need to avoid unproductive delay in adjudication and the need to obtain information essential to having a complete record. 5 C.F.R. 1201.71. An order for discovery will specify, where appropriate, the conditions under which discovery will be conducted.

MERIT SYSTEMS PROTECTION BOARD

PRIVACY ACT STATEMENT

During the course of processing the appeal, it is necessary to collect personal information that is relevant and necessary to reaching a decision in your case. The Merit Systems Protection Board collects this information in order to process appeals under one or more of the following authorities: Title 5 U.S.C., sections 1302, 3301, 3302, 5115, 5338, 5346, 7151, 7154, 7301, 7501, 7512, 7701 and 8347, as well as Executive Orders 9830, 11222, 11478, 11491, and 11787. Since the appeal is a voluntary action, appellant is not required to provide any personal information to the Merit Systems Protection Board in connection with the appeal. However, failure to provide all information essential to reaching a decision in the case could result in the cancellation of the appeal.

The appeal decisions of the Merit Systems Protection Board are final administrative decisions and as such are available to the public under the provisions of the Freedom of Information Act. Some information about the appeal is used in depersonalized form as a data base for program statistics. If there is a need to disclose information from the appeal file for reasons other than these, or those cited in the Privacy Act (Title 5, United States Code, 552a(b)), appellant's prior written consent will be solicited.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WASHINGTON REGIONAL OFFICE

THEODORE YANOPOULOS,	)	Date: November 1, 1982
v.	)	
DEPARTMENT OF THE NAVY	)	

ORDER FOR HEARING

1. Date and Location. The hearing in this appeal will be held at the following time and location:

DATE: December 14, 1982

TIME: 9:00 a.m.

LOCATION: Skyline Place #2
Suite 1109
5203 Leesburg Pike
Falls Church, Virginia

2. Witnesses. Each party must file with the Presiding Official a list of the names of the witnesses it intends to call at the hearing. The list must contain a brief

description of the anticipated testimony of each witness. The Board expects the parties to arrange for the presence of witnesses at the hearing either by themselves or through cooperation with the opposing party. Only if cooperation fails should the parties request assistance from the Presiding Official. Witnesses whose testimony is irrelevant or repetitious will not be permitted to testify at the hearing. More specific guidelines for arranging for the appearance of witnesses may be found in Attachment D.

3. Hearing Exhibits. To avoid delay at the hearing, exhibits which are expected to be introduced into evidence should be served on the opposing party.

4. Time Limits. In preparing for the hearing, all parties must meet the deadlines prescribed below:

Filing and service notice of, or request for, witnesses; filing and serving copies of any other requests or motions of any type, including discovery.	November 26, 1982
Filing and serving objections to the above.	December 3, 1982
Serving copies of hearing exhibits on opposing party.	5 workdays prior to the hearing

Absent unusual circumstances, no action will be taken on any request or motion filed after the above-cited deadlines. Any party filing an objection to a request based solely on untimely service must show how the untimely service prevented compliance with the request or otherwise prejudiced their rights.

5. Postponements. It is the policy of the Board to issue an Initial Decision within 120 days of the date the appeal was filed. Requests for postponement of a scheduled hearing must be supported by affidavit and may only be granted upon a

showing of good cause.

6. Failure to Appear. If a party fails to appear for the hearing, without good cause, the hearing will proceed or the case will be decided on the basis of the existing record. Depending on the circumstances, failure to appear may also result in sanctions.

7. Service. All material filed with the Presiding Official must be served on the opposing party as described in paragraph 1 of the Initial Order in this appeal.

8. Settlement. At least 10 days prior to the hearing date, the agency representative is directed to contact the appellant or his or her representative to discuss the possibility of settling this appeal. Both parties should be prepared to advise the Presiding Official regarding the outcome of these negotiations on the

hearing date.

STEPHANIE MARKS
PRESIDING OFFICIAL

Enclosure Attachment D

cc Theodore Yanopoulos
Pam Smith

ATTACHMENT D

Arranging for the appearance of witnesses at the hearing.

There are three methods which may be used to secure the appearance of witnesses at a hearing. Whichever method or combination of methods is used, the parties must notify the presiding official in writing, with a copy to the opposing party, of the names of the witnesses to be called with a brief summary of their anticipated testimony. This information must be submitted by the deadline date given in the notice of hearing.

1. The parties arrange for the witnesses to appear voluntarily. The parties need only send the presiding official copies of the witness list as stated in the hearing notice. Under this procedure the presiding official generally will not issue an order regarding the appearance of witnesses.

2. The parties cooperate with each other on the appearance of witnesses. The presiding official intervenes only if cooperations fails.

Under this method, the appellant presents a written request to the designated representative of the agency asking the agency to arrange for the appearance of its employees as witnesses. It is advisable for the request to contain a brief explanation of why the testimony of a witness would be relevant to the case, in the event that the presiding official must rule on an objection to the request. The appellant must send two (2) copies of the request to the presiding official. The agency complies with the request, resolves any difficulties concerning the request with the appellant, or if cooperation fails, files a written objection to the request with the presiding official, sending a copy to the appellant.

The presiding official rules on the objections and, if appropriate, orders the agency to produce the witness in question. If the presiding official is not informed of objections by either party, the presiding official will assume that the parties have resolved any questions on the appearance of witnesses. Under this circumstance the presiding official will generally not issue an order concerning witnesses.

Both parties must comply with the deadlines for requesting witnesses or filing objections stated on the notice of hearing. Federal agencies are required to arrange for the appearance of employees as witnesses at Board hearings upon request of the presiding official. Employees are in official duty when testifying.

3. The parties may move that a subpena be issued to compel the appearance of a person to testify at a hearing.

A motion for subpena must be in writing, identify the person, papers, and documents desired, and be supported by a showing of general relevance and reasonable scope of the evidence sought. Two copies of the motion must be filed with the presiding official. One copy must be served on the opposing party. Only the Board members and an administrative law judge of the Board have the authority to issue subpenas. The presiding official will refer the motion to a Board member or an administrative law judge, who will act on the motion directly or authorize the presiding official to do so. Both parties must comply with the deadlines for filing such motions stated in the notice of hearing.

If a subpena is issued, the party who requested it is responsible for serving it on the individual subpenaed in accordance with 5 C.F.R. 1201.85 and 1201.86. The parties must also bear the costs of the witness' appearance under 5 C.F.R. 1201.37(b).

Finally, no matter under what procedure the appearance of a witness is obtained, the parties should make an effort to reduce the amount of time a witness has to wait before he or she is called to testify. For example, a witness who is not scheduled to testify until afternoon should not be told to report at 9:00 a.m.